

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 92-10

In the Matter of

Amendment of Section 73.202(b), RM-7865
Table of Allotments,
FM Broadcast Stations.
(Sanibel and San Carlos
Park, Florida)

NOTICE OF PROPOSED RULE MAKING

Adopted: January 15, 1992; Released: January 28, 1992

Comment Date: March 20, 1992

Reply Comment Date: April 6, 1992

By the Assistant Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Ruth Communications Corporation ("petitioner"), permittee of Station WRWX(FM), Channel 253A, Sanibel, Florida, requesting the reallocation of Channel 253A from Sanibel to San Carlos Park, Florida, as that community's first local transmission service, and the modification of its construction permit to specify San Carlos Park as its community of license. Petitioner states that it will apply for Channel 253A at San Carlos Park, if allotted.

2. Petitioner seeks to invoke the provisions of Section 1.420(i) of the Commission's Rules, which permits the modification of a station's license to specify a new community of license without affording other interested parties an opportunity to file competing expressions of interest. See *Modification of FM License ("Change of Community R&O")*, 4 FCC Rcd 4870 (1989), *recon. granted in part ("Change of Community MO&O")*, 5 FCC Rcd 7094 (1990). Petitioner recognizes that the Commission prohibits the removal of a community's sole local transmission service, except "in rare circumstances where removal of a local service might serve the public interest." 5 FCC Rcd at 7096. Petitioner claims that removal of Sanibel's sole local transmission service is warranted here.

3. Petitioner states that the reallocation of Channel 253A would provide San Carlos Park, a community of 11,785 persons,¹ with its first local transmission service, whereas it is currently impossible to provide any service at Sanibel, a community of 5,468. Petitioner notes that it

has been attempting to construct and operate Station WRWX(FM) at Sanibel since September 1988. However, petitioner argues, various federal, state and local authorities have objected to petitioner's proposed transmitter sites. Petitioner states that local zoning ordinances prohibit construction of a tower on Sanibel Island, where Sanibel is located. The site petitioner originally specified in a 1983 application (BPH-830217AI) for the Sanibel allotment has been declared as environmentally sensitive wetlands and is no longer available, and the city of Sanibel has purchased surrounding property as a conservation area. No other site is available on Sanibel Island or nearby Pine Island for construction of a new tower. Operation from an existing tower on Pine Island or the mainland is not possible because of short-spacing or other technical concerns. Petitioner states that she attempted to use a directional antenna for a site on Pine Island to avoid the short-spacing, but the proposed tower would be located near a bald eagle's nest. As a result, the Florida Game and Fresh Water Commission rejected the proposed tower. Petitioner claims that attempts to reach a compromise were unsuccessful. As a consequence, petitioner has never operated Station WRWX(FM) at Sanibel. On the other hand, petitioner claims that if the channel was reallocated to San Carlos Park, it could operate Station WRWX(FM) from an existing tower.

4. Petitioner states that San Carlos Park is a Census Designated Place located in Lee County, Florida. Petitioner states that San Carlos Park has its own fire department, sheriff's department, and two elementary schools. San Carlos Park has numerous community and civic organizations, including the San Carlos Civic Association, Kiwanis, Optimist and Rotary Clubs, and a VFW Post and Auxiliary. There are churches, child care centers, physicians, dentists, accountants, insurance, a real estate service, several banks, and other retail stores and restaurants. San Carlos Park is also served by three newspapers. Petitioner submits that a number of businesses identify themselves with the name of San Carlos Park. Petitioner states that all the indicia support a conclusion that San Carlos Park is a community.

5. An engineering analysis has determined that Channel 253A can be allotted to San Carlos Park in compliance with the Commission's minimum distance separation requirements with a site restriction of 10.9 kilometers (6.8 miles) west,² in order to avoid a short spacing to Station WKGR(FM), Channel 254C, Fort Pierce, Florida.

6. We do not generally believe that the public interest is served by removing a community's sole local service merely to provide a first local transmission service to another community. While the removal of Channel 253A from Sanibel would remove that community's only local service, and provide a first local transmission service to San Carlos Park, petitioner has shown that it is unable to operate the station at Sanibel despite diligent efforts. Since Station WRWX(FM) has never been on the air, a change in community will not cause any disruption to existing service. Therefore, we believe the public interest would be

¹ Population figures are taken from the 1990 Census.

² The coordinates for Channel 253A at San Carlos Park are North Latitude 26-30-02 and West Longitude 81-54-16. This site is currently short-spaced to Station WCOO(FM), Channel 252A, Immokalee, Florida. Station WCOO was ordered to operate on Channel 221A in lieu of Channel 252A in MM Docket No.

88-608. In the event that petitioner's proposal is granted, we may withhold the grant of an authorization for petitioner to operate at the new community until Station WCOO is authorized to operate on Channel 221A. We will serve the licensee of Station WCOO with a copy of this Notice.

served by seeking comments on this proposal. We request comments on our tentative conclusion that a waiver of our restriction on removal of sole existing local transmission service is warranted in this instance.

7. As requested, we will propose to modify petitioner's construction permit for Station WRWX(FM) to specify San Carlos Park as its community of license. In accordance with Section 1.420(i) of the Commission's Rules, we will not accept competing expressions of interest in use of Channel 253A at San Carlos Park or require the petitioner to demonstrate the availability of an additional equivalent class channel for use by such parties.

8. Accordingly, the Commission believes it would be in the public interest to seek comments on the proposal to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, with respect to the following community:

City	Channel No.	
	Present	Proposed
Sanibel, Florida	253A	--
San Carlos Park, Florida	--	253A

9. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

10. Interested parties may file comments on or before **March 20, 1992**, and reply comments on or before **April 6, 1992**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

David G. O'Neil
Haley, Bader & Potts
2000 M Street, N.W., Suite 600
Washington, D.C. 20036-3374

11. IT IS FURTHER ORDERED That the Secretary of the Commission shall send a copy of this *Report and Order* by Certified Mail, Return Receipt Requested, to the licensee of Station WCOO, (FM), as follows: Naples Radio Partners, Ltd. 21010 Center Ridge Road, Rocky River, OH 44116.

12. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

13. For further information concerning this proceeding, contact Nancy J. Walls, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are

advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Michael C. Ruger
Assistant Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut - off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (See Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as

they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (See Section 1.420(a), (b) and (c) of the Commission's Rules.)

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.